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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL J. MCARDLE, Defendant and Appellant.	E045143 (Super.Ct.No. INF045857) OPINION

APPEAL from the Superior Court of Riverside County. James S. Hawkins, Judge. Affirmed.

Aviles & Associates, Moises A. Aviles and Joyce H. Vega for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Angela Borzachillo, and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Michael J. McArdle appeals from a postjudgment order denying his motion to withdraw his guilty plea and from an order reinstating his probation after it had been summarily revoked. He contends that the judgment is void *ab initio* because the restraining orders which underlie the two contempt counts to which he pleaded guilty are prior restraints on his free speech, in violation of the First Amendment. We conclude that the motion to withdraw the guilty plea was properly denied as untimely, and that because defendant did not appeal following his guilty plea, he may not now raise the contention that the conviction violates his First Amendment rights.[1]

BACKGROUND

In 2005, defendant was charged with two counts of felony stalking, based on allegations that he followed and harassed two Palm Springs police officers and made credible threats with the intent to place the officers in reasonable fear for their safety. (Pen. Code, § 646.9; counts I & II.)[2] He was also charged with two misdemeanor counts of willful disobedience of a court order. (§ 166, subd. (a)(4); counts III & IV.) Counts III and IV were based on restraining orders which were served on defendant in October 2003

[1] Pursuant to Evidence Code section 452, subdivision (d), we take judicial notice that defendant raised the same issues he raises in this appeal in *In re Michael J. McArdle on Habeas Corpus*, E045070. We denied the petition summarily on February 15, 2008. On March 26, 2008, the Supreme Court denied defendant's petition for review. (*In re Michael McArdle on Habeas Corpus*, S161104.)

[2] All further statutory references will be to the Penal Code unless otherwise indicated.

and which apparently ordered defendant not to have contact with either police officer.[3] According to the evidence presented at the preliminary hearing, defendant continued to contact the officers by e-mail and telephone during the period in which the restraining orders were in effect. The messages described one officer as a Nazi and included threats against the officers and their families. The messages also expressed defendant's intention to quash the restraining orders.

On June 9, 2006, defendant pleaded guilty to the two misdemeanor counts, and the felony counts were dismissed. Defendant was granted summary probation for 36 months. Jail time imposed as a condition of probation was suspended. As conditions of probation, defendant was ordered to stay 100 yards away from the two police officers, not to contact them, and not to contact the Palm Springs Police Department, except in an emergency or to report a crime. Defendant did not appeal from that judgment.

In November 2007, defendant filed a motion to withdraw his guilty plea, asserting that there was "insufficient evidence to support the original charges in the first place"; that he received ineffective assistance of trial counsel; and that "there was no original crime to begin with, because as a matter of law, the recipients of the Restraining Orders, two Palm Springs Police Officers, would not have been entitled to the Restraining Orders, since they, by law, could not suffer emotional distress." On January 4, 2008, the trial court denied the motion.

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[3] The restraining orders are not contained in the record on appeal.

In April 2007, defendant's probation was summarily revoked. Following a hearing on February 11, 2008, the court reinstated defendant's probation with the added condition that defendant serve 30 days in jail.

On February 11, 2008, defendant filed separate notices of appeal from the order denying his motion to withdraw his guilty plea and from the order reinstating his probation.

LEGAL ANALYSIS

THE COURT PROPERLY DENIED THE MOTION TO WITHDRAW THE GUILTY PLEA BECAUSE THE MOTION WAS NOT TIMELY

Section 1018 provides, in pertinent part, "On application of the defendant at any time before judgment *or within six months after an order granting probation is made if entry of judgment is suspended*, the court may, and in case of a defendant who appeared without counsel at the time of the plea the court shall, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice." (Italics added.) The trial court denied the motion, finding it untimely pursuant to section 1018.[4]

Defendant's motion to withdraw his guilty plea was filed approximately one year and five months after he was granted probation. Nevertheless, he contends that the court had the authority to grant the motion.

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[4] The court also determined that defendant knowingly, intelligently and voluntarily entered his guilty plea. Defendant does not address that finding.

Defendant relies on *People v. Caruso* (1959) 174 Cal.App.2d 624. In that case, the court held that "although [section 1018] specifies that the withdrawal of a plea of guilty may be permitted before judgment . . . the court has the power to permit such withdrawal and the substitution of a not guilty plea after judgment has been pronounced." (*Id*. at p. 633.) However, at the time *Caruso* was decided, section 1018 stated only that a guilty plea could be withdrawn at any time before entry of judgment. (Stats. 1951, ch. 858, § 1, p. 2369.) It was amended in 1991 to provide, as it does now, that in cases in which probation is granted and entry of judgment is suspended, the withdrawal motion must be made within six months after the order granting probation is made. (Stats. 1991, ch. 421, § 1, p. 2172.) In *People v. Miranda* (2004) 123 Cal.App.4th 1124, the Court of Appeal reviewed the legislative history of the 1991 amendment and concluded that the Legislature intended to place a mandatory limit on the time in which a defendant may bring a motion to withdraw a guilty plea after a grant of probation. (*Id.* at pp. 1130-1132.) The legislative history reveals that the Legislature was concerned that the absence of such a provision permitted defendants to withdraw guilty pleas at any time after a grant of probation, even many years later, resulting in "'missing witnesses, faulty recollections, and other problems in bringing the case to trial.' [Citation.]" (*Id*. at p. 1132.) Accordingly, the court held, the provision is mandatory and not merely directory, and a court simply has no authority to grant a withdrawal motion which is filed beyond the six-month limitation period. (*Id*. at pp. 1133-1134.) We agree with the *Miranda* court's

analysis. Because defendant's motion was not timely, the trial court properly denied it on that basis.

Having concluded that defendant's motion was time-barred, we need not address his related contention that the motion should have been granted on grounds of ineffective assistance of counsel.

THE CONSTITUTIONALITY OF THE UNDERLYING RESTRAINING ORDERS MAY NOT BE ADDRESSED IN THIS APPEAL

Defendant argues next that the judgment of contempt and the resulting order for probation are void because the underlying restraining orders are an unconstitutional prior restraint on free speech.

Defendant made this argument both in his motion to withdraw his guilty plea and at the probation revocation hearing. In his briefing, he does not explicitly state whether he raises the issue in connection with the denial of the motion or in connection with the reinstatement of his probation. We will assume that his arguments apply to both. With respect to the withdrawal motion, the argument is ineffectual because the motion was properly denied as untimely. (See discussion, *ante*.) To the extent that we can construe his briefing as arguing that the order reinstating his probation is invalid on this ground, we conclude that the constitutionality of the underlying restraining order is not an issue that can be raised in this appeal.

Following a guilty plea, a defendant may challenge the legality of the proceedings or the conviction, if he obtains a certificate of probable cause. (§ 1237.5.)[5] An order suspending imposition of sentence and placing the defendant on probation is a final order for purposes of triggering the time for appeal. (§ 1237, subd. (a); *People v. Howard* (1997) 16 Cal.4th 1081, 1087.) If the defendant files a timely notice of appeal—i.e., within 60 days of the date of the order for probation (see Cal. Rules of Court, rule 8.308(a))—the defendant may raise any issue going to the legality of the conviction, within the limits provided in section 1237.5. However, if a timely notice of appeal is not filed, the defendant may not in a subsequent appeal obtain review of "matters giving rise to [the] conviction and the ensuing order granting . . . probation." (*People v. Glaser* (1965) 238 Cal.App.2d 819, 821, disapproved on other grounds in *People v. Barnum* (2003) 29 Cal.4th 1210.)

The constitutionality of the restraining orders which underlie defendant's conviction is an issue going to the legality of the proceedings, in that dismissal of the two counts to which defendant pled guilty would have been mandatory if the restraining orders had been found to violate defendant's rights under the First Amendment. (See *People v. Moore* (2003) 105 Cal.App.4th 94, 99-101 [denial of discovery motion is cognizable on appeal following guilty plea because motion sought evidence which might

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[5] Section 1237.5 provides that an appeal may be taken following a plea of guilty if the defendant files in the trial court a written statement, under oath or penalty of perjury, "showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings" (§ 1237.5, subd. (a)), and the trial court issues a certificate of probable cause for the appeal.

have supported claim that prosecution was in violation of equal protection clauses of the state and federal Constitutions].) Had defendant filed a notice of appeal, he could have obtained a certificate of probable cause to challenge the validity of his conviction on that ground. However, defendant did not appeal following his guilty plea. Consequently, he may not challenge the constitutionality of the restraining orders in this appeal.

Defendant also argues, under the same caption, that there is no valid underlying offense because there was no evidence that the police officers suffered any emotional distress and because police officers "cannot legally suffer from emotional distress, as they are constitutionally exempt from alleging emotional distress as required by Code of Civil Procedure §527.6." These arguments also go to the validity of the underlying restraining orders, and cannot be raised for the first time in this appeal.

SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S FINDING THAT DEFENDANT VIOLATED PROBATION

As conditions of his probation, defendant was ordered not to contact the Palm Springs Police Department except to report a crime or in an emergency. The allegation that he violated that condition of probation was based on identical e-mails sent to several employees of the Palm Springs Police Department at their work e-mail addresses. The message did not report either a crime or an emergency. The e-mails were sent from the address "ComingInThruWavs@aol.com" and bore defendant's name at the end of the message. Defendant contends that there was insufficient evidence to support the

conclusion that he sent the e-mails because the prosecution failed to prove that "ComingInThruWavs@aol.com" is his e-mail address.

In reviewing a contention that a judgment or order is not supported by sufficient evidence, we review the entire record to determine whether the record contains evidence, contradicted or uncontradicted, which is reasonable, credible and of solid value and which would support a finding in support of the issue in question if believed by the trier of fact. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651-652.) In determining whether substantial evidence exists, the appellate court views all factual matters in the light most favorable to the prevailing party and presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1028.) Here, Palm Springs Police Lieutenant Dennis Graham testified that the e-mail, identified as exhibit 3, was "nearly identical to numerous e-mails" he had received from defendant, and that it contained references to "situations, words and phrases" he had seen in numerous e-mails from defendant. Graham was present at the hearing on the application for a restraining order against defendant in 2004; exhibit 3 mentioned the 2004 TRO hearing. It also referred to Mark Blankenship, the attorney who represented defendant at that time. Exhibit 3 mentioned the Palm Springs Police Department stealing defendant's holster and knives, an allegation defendant brought up in previous e-mails and also in the civil hearing. It stated that Dennis Graham had embezzled municipal funds, an accusation that had been made only by defendant, as far as Graham was aware. It referred to other "recurring theme[s]" in

prior e-mails, such as extortion of $54,000 from "an 89-year-old totally disabled widow," and the contention that Eisenhower Medical Center and the Annenberg Trust are "masters of the district attorney's office, Palm Springs police department [and] Riverside county sheriff's department."

Graham's testimony reasonably supports the conclusion that defendant sent the e-mails. Whether "ComingInThruWavs@aol.com" was defendant's e-mail address is irrelevant; defendant's own witness agreed that a person could use someone else's e-mail address and password to send an e-mail. Consequently, the prosecution's failure to prove that it was defendant's e-mail address does not compel the conclusion that there is insufficient evidence to support the finding that he sent the e-mails in violation of his probation.

DISPOSITION

The judgment is affirmed.

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/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.

/s/ Hollenhorst
J.